BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: GROWTH RESOURCE GROUPS, INC. Respondents.	File No.: 603-4193; 603-4736; 603-5646; & 605-1810 OAH No.: L2005060260

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Commissioner of Corporations as his Decision in the above-entitled matter.

This Decision shall become effective on OCTOBER 19, 2006.

IT IS SO ORDERED this 18TH day of OCTOBER 2006.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

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In the Matter of the Accusation Against: **GROWTH RESOURCE GROUP, INC.,** Respondent.	File Nos. 603-4193; 603-4736; 603-5646; & 605-1810 OAH No. L2005060260

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on April 24-26, 2006, in Los Angeles.

Judy L. Hartley, Senior Corporations Counsel, represented Complainant.

Jack I. Samet, Esq., and Lisa I. Carteen, Esq., Baker & Hostetler LLP, represented Respondent. Garry D. Gladstone, a corporate officer of Respondent, was also present each day.

Various motions were heard and decided at the outset of the hearing. The parties made opening statements. Oral and documentary evidence was thereafter offered and received. The parties presented closing arguments. The record was initially closed at the conclusion of the hearing on April 26, 2006.

On May 26, 2006, the ALJ re-opened the record so the parties could brief a particular legal issue. The parties' briefs were timely received. The ALJ's Order re-opening the record and the parties' briefs are collectively marked as exhibit 23. The record was again closed and the matter submitted for decision on June 15, 2006 (when the last brief was received).

FACTUAL FINDINGS

Parties & Jurisdiction

1. Complainant Wayne Strumpfer was the Acting California Corporations Commissioner (Commissioner) when Senior Corporations Counsel Judy L. Hartley issued the Accusation on his behalf on May 10, 2005.

2. Respondent Growth Resource Group, Inc. (Respondent or GRGI) is a finance lender/broker licensed by the Commissioner pursuant to the California Finance Lenders Law (CFLL), located at Financial Code section 22000 et seq.

3. Respondent currently has four licenses issued by the Commissioner under the CFLL. License number 603-4193 is for Respondent doing business as EZ Car Cash, with its place of business located at 31877 Del Obispo, Suite 214, San Juan Capistrano. License number 603-4736 is for Respondent doing business as GRGI. License number 603-5646 is for Respondent doing business as GRGI. License number 605-1810 is for Respondent doing business as GRGI, with its place of business located at 9609 Van Nuys Boulevard, Suite 101, Panorama City.

The Initial Dispute over Respondent's Loan Practices

4. Respondent was incorporated in the State of California in 1989. Garry D. Gladstone is Respondent's President, C.F.O. and on its Board of Directors. Respondent makes loans to high-risk borrowers who need money immediately. A borrower's vehicle secures the loan. If a borrower defaults on the loan, Respondent has recourse to the borrower's vehicle to recover the loan amount. However, Respondent requires that the vehicles used as collateral for the loans be covered by sufficient insurance, with Respondent as a loss payee, in case the vehicles are damaged, destroyed or stolen. If a borrower does not have sufficient automobile insurance at the time of the loan, or cannot prove the existence of such, Respondent will obtain appropriate insurance for the vehicle and add the cost of the insurance to the loan amount.

5. On June 9, 1997, the Department of Corporation's staff (Department staff) conducted an examination of records pertaining to Respondent's license number 603-4193. Department staff came to believe that interest rates charged by Respondent on some loans were improper. Department staff specifically contended that administrative fees and insurance premiums were improperly added to loan amounts so as to cause the loans to exceed the amount of $2,500.00, which allowed Respondent to charge a greater interest rate than if the loan amounts were less than $2,500.00. The Commissioner demanded in writing that Respondent recast such loans, make refunds to involved borrowers and submit to the Commissioner a report of that action by September 2, 1997. The Commissioner also stated that failure to do as demanded might subject Respondent to administrative action.

6. Respondent vigorously opposed the Commissioner's above-described contentions and demands. Respondent hired attorney Michael Franchetti, and then attorney Steven Gourley, to represent it in that dispute. Mr. Gourley was formerly a highly placed employee of the Department. The parties engaged in frequent exchanges about this dispute from 1997 through 1999. During this time, other related issues were discussed. Nonetheless, Respondent at all times maintained that its loan practices were legal and that it would be successful in any administrative action brought against it by the Commissioner. For example, in October of 1997, Mr. Gourley advised Department staff that he knew a similar argument the Commissioner had made against another entity in a proceeding before the Los Angeles Superior Court had been rejected. Mr. Gourley also advised Department staff of an earlier opinion issued by Legislative Counsel of California, which, he asserted, supported the legality of Respondent's loan practices.

Settlement of the Dispute Regarding Respondent's Loan Practices

7. During the above-described exchanges between the parties, Respondent's attorneys also aggressively sought to involve Department staff in settlement discussions. The stated reason for engaging in such settlement discussions was to avoid any civil or administrative action by the Commissioner against Respondent. As a result, the parties engaged in extended settlement negotiations from 1997 through 1999.

8. The CFLL applications for Respondent's license numbers 603-5654 and 605-1810 were submitted at some point during the settlement negotiations.

9. On March 17, 1999, the Commissioner and Respondent entered into a written Settlement Agreement, which included, among other provisions, the following:

A. The parties agreed the Commissioner's contentions at the time were that Respondent: did not calculate administrative fees added to loan amounts in conformity with the law; failed to timely notify potential borrowers of the requirement to provide proof of insurance protecting Respondent or that such insurance would be placed by Respondent at the borrower's cost; caused a significant number of loans to exceed the regulated interest rate for loans up to $2,500.00, "thereby resulting in interest rates in excess of the regulated interest rate pursuant to Section 22304 of the Financial Code"; did not reduce interest rates or make refunds on loans that were later reduced below $2,500.00, and therefore subject to the lower regulated interest rates, when the insurance placed by Respondent was cancelled; operated rebate programs that were not in compliance with the law; and issued threatening letters to borrowers who had complained to the Commissioner.

B. The parties stated that it was their desire to settle the matter to avoid litigation or administrative proceedings. The parties further stated that the settlement was not an admission or denial of the Commissioner's above-described contentions.

C. Respondent agreed to (i) review all loans made during the period of November 1995 through October 1997 to determine every loan that involved collateral insurance placed by Respondent where the collateral insurance was flat cancelled at any time during the term of the loan, (ii) recast all such loans, and (iii) refund all excess interest paid by the borrowers where the recast loan amount was under $2,500.00. The term "recast" was defined to mean that the insurance premium paid by Respondent would be subtracted from the original principal loan amount determined by Respondent, and the interest rate of the loan and any accrued interest would be recalculated based on the new principal loan amount.

D. Respondent agreed to make the required refunds over a period of two years, to commence in April of 1999, "at a rate that ensures a similar dollar amount of refunds per month."

E. Respondent would escheat to the State Controller's Office all refunds returned as undeliverable "within the time period provided by the Unclaimed Property Act, Code of Civil Procedure, Sections 1500 et seq. which the parties understand to be three years from the date upon which it is determined that the refund is undeliverable."

F. Respondent would provide quarterly reports to the Commissioner "setting forth information regarding all refunds made during that quarter."

G. Respondent agreed to remedial measures relating to the Commissioner's other contentions described above regarding administrative fees, notice to borrowers about the addition of insurance costs to the loans, minimum loan amounts, rebate programs, the addition of legal fees in dispute resolutions contrary to the CFLL, and threatening contacts to borrowers who complained about Respondent to the Commissioner.

H. The Commissioner granted the two pending license applications and agreed to not take any administrative or civil action against Respondent so long as it complied with the Settlement Agreement.

I. The Commissioner did not reduce the Settlement Agreement to a Decision or Order.

10. It was not established by a preponderance of the evidence that the parties made a mutual mistake of law in executing the Settlement Agreement regarding when Respondent was required to escheat the undeliverable refunds.[1] The recitations in the Settlement Agreement regarding escheatment were legally correct.[2]

Passage of Senate Bill 579

11. In 1998, while the parties were involved in the settlement negotiations described above, the Commissioner began efforts to sponsor Senate Bill 579 (SB 579), which excluded certain charges from being included in a consumer loan for purposes of calculating interest. Most of the action on the bill was not taken until 1999, because a new administration (Governor Davis) was coming into office in January of that year. Thus, SB 579 was formally introduced in February 1999, and was passed by the Legislature later in 1999 (after the Settlement Agreement was executed by the parties), with an effective date of January 1, 2000. The effect of the bill was to prevent certain consumer loans from exceeding the regulated interest rate threshold for small loans below $2,500.00 by the addition of charges, such as administrative fees or insurance premiums.

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[1] See Legal Conclusion 2 below, regarding the burden and standard of proof for an affirmative defense.

[2] See Legal Conclusion 4 below.

12. It was not established by a preponderance of the evidence that, during negotiations leading to the Settlement Agreement, the Commissioner or Department staff made a false statement about whether Respondent's above-described loan practices conformed to existing law, or that the Commissioner or Department staff knew that any such statement was false.[3] To the contrary, the totality of the evidence established that Department staff then believed probable cause existed for administrative action against Respondent due to various of its loan practices, including the addition of administrative fees and insurance premiums to loan amounts for purposes of calculating interest and the failure to thereafter recalculate interest when such insurance was cancelled and the loan amount fell below $2,500.00. The legislative materials for SB 579 drafted by Department staff that were presented during the hearing of this matter indicate that staff clearly believed the wording of the law in existence before SB 579 was "uncertain" about the legality of adding fees and premiums to loan amounts, and that "[l]icensees will benefit from a bill that clarifies their responsibilities under existing law."

13. SB 579 did not involve the many other issues in dispute between the parties that were resolved by the Settlement Agreement.

14. Nobody from the Department disclosed to Respondent or its attorneys before the Settlement Agreement was executed the fact that SB 579 was pending.

15. It was not established that Respondent would have refused to execute the Settlement Agreement had it known that SB 579 was pending. Mr. Gladstone's testimony at the hearing that such was the case was speculative. At the time that the Settlement Agreement was executed, Respondent's attorneys understood the existing legal landscape so as to assess how Respondent would fare in any administrative action regarding its loan practices. Moreover, the Settlement Agreement covered many issues other than the addition of insurance premiums to loan amounts. It is clear from the correspondence exchanged by the parties before the Settlement Agreement that Respondent wanted to avoid any administrative action, not just action limited to the issue of adding administrative fees and insurance premiums to loans.

The Commissioner's Efforts to Enforce the Settlement Agreement

16. Pursuant to the Settlement Agreement, Respondent issued refunds to various borrowers from April 1999 through April 2001. Mr. Gladstone estimates that Respondent issued refunds totaling approximately $300,000.00 during that period, but that approximately $200,000.00 of those refunds was returned to Respondent as undeliverable. Complainant does not dispute those amounts.

17. From June 2000 through May 2001, Respondent sent quarterly reports to the Commissioner regarding refunds made pursuant to the Settlement Agreement. The reports disclosed the names, account numbers and amounts refunded to the involved borrowers. The last report sent in May 2001 indicated that all the refunds subject to the Settlement Agreement had been issued.

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[3] See Legal Conclusion 2 below.

18. An audit of Respondent's books and records conducted by the Department's staff in 2002 revealed no deficiencies. According to the testimony of Mr. Gladstone, Department Senior Examiner Eric Davies was given access during that audit to cancelled checks from delivered refunds and returned envelopes from undeliverable refunds.

19. On August 12, 2003, Department staff conducted a regulatory examination of the books and records of Respondent under the CFLL. The regulatory examination disclosed that Respondent had not escheated any amount to the state.

20. Mr. Gladstone testified that Respondent had not started the process of escheating undeliverable refunds by the time of the August 2003 audit because he believed the Settlement Agreement provided for three years to elapse from the end of the two-year refund payment period before Respondent was required to start making escheatment payments. By Mr. Gladstone's calculations, Respondent did not have to start making escheatment payments until March or April of 2004.

21. As a result of the August 2003 examination, Department Specialist Kenneth K. Wu sent to Respondent a letter dated November 3, 2003, which, in part, demanded that Respondent escheat the undeliverable refunds, as follows:

> In March 1999 the Department and the company entered into a settlement agreement requiring certain refunds be made. Any sums held by a business that have been ordered to refunded (sic) by an administrative agency that remain unclaimed by the owner for more than one year after becoming payable shall be escheated to the state, (Sec. 1519.5 Code of Civil Procedure). More than a year has elapsed since the last refunds were issued. The company is required to immediately escheat all unclaimed refund checks. In your response please provide supporting documentation that all outstanding refunds (sic) checks have been properly escheated.

22. In making the above-described demand in his letter dated November 3, 2003, Mr. Wu had not reviewed the Settlement Agreement and had not considered the specific escheat timing provision contained therein. Mr. Wu therefore erroneously stated in his letter that the applicable time limit for escheatment was the one year period of Code of Civil Procedure section 1519.5.

23. Mr. Wu's November 3, 2003 letter triggered the instant dispute between the parties, including the following exchanges:

A. By December 2003, Respondent retained attorney James A. Vickman regarding the escheatment issue. Mr. Vickman sent a letter that month to the Commissioner and Mr. Wu, in which he requested that the escheatment obligation be waived. Mr. Vickman cited SB 579 and argued such was a "change in law" so soon after the Settlement Agreement as to provide an equitable basis for a waiver. In April 2004, Mr. Vickman sent another letter

requesting a waiver, in a firmer tone, arguing that comments made by Department staff to the State Senate during the passage of SB 579 revealed that they had asserted inconsistent positions about the legality of Respondent's loan practices during the negotiations leading to the Settlement Agreement.

B. In response to Mr. Vickman's letters, Department staff stated that they had not taken inconsistent positions regarding the legality of Respondent's loan practices and rejected Respondent's requests to waive the escheatment provision of the Settlement Agreement.

C. In October of 2004, Respondent replaced Mr. Vickman with C. Thomas Drosman as its counsel regarding the escheatment dispute. In a letter sent to the Department that month, Mr. Drosman argued that Code of Civil Procedure section 1519.5 applied to the Settlement Agreement and that Respondent had to escheat the undeliverable refunds after only one year from when it was determined they were undeliverable. Mr. Drosman thus asserted that the parties had made a mistake of law in the Settlement Agreement where they stated the relevant time period was escheatment after three years from the date upon which it was determined that a refund was undeliverable. Mr. Drosman did not argue in his letter that the Commissioner had taken inconsistent positions regarding the operation of the laws pertaining to Respondent's loans at the time of the Settlement Agreement or otherwise refer to SB 579. Mr. Drosman did request, however, that the Commissioner assist Respondent in approaching the State Controller's Office regarding the issue of whether Respondent's lateness in escheating refunds would subject it to late penalties and/or interest charges.

D. No evidence indicates the Commissioner responded to Mr. Drosman's letter or otherwise agreed to approach the State Controller's Office.

E. It was not established that, at any time before the hearing of this matter, the Commissioner had notified Respondent that Mr. Wu had been in error when he asserted that the one year escheatment period of Code of Civil Procedure section 1519.5 applied to the Settlement Agreement.

24. During the period of the exchanges described above in Factual Finding 23, Department Senior Examiner Charles Agbonkpolor demanded, by a letter dated March 29, 2004, that Respondent provide documentation regarding the delivered refunds and escheatment of the undeliverable refunds that were subject to the Settlement Agreement. Respondent did not comply with the request. Senior Examiner Agbonkpolor again requested that documentation in correspondence dated June 28, 2004, July 13, 2004, September 22, 2004, and October 12, 2004. Respondent did not comply with any of those requests.

25. During the period of the exchanges described above in Factual Finding 23, Department Supervising Counsel Alan S. Weinger, by a letter dated February 23, 2004, reiterated the demand that Respondent escheat the outstanding undeliverable refunds pursuant to the Settlement Agreement. In as much as the letters described above from Senior Examiner Agbonkpolor requested proof that Respondent had already escheated undeliverable refunds,

those letters can also be construed as demands that Respondent escheat the undeliverable amounts pursuant to the Settlement Agreement. However, because those letters did not clarify or correct Mr. Wu's statement regarding the timing of escheatment in his November 2003 letter, it was not established that these requests demanded escheatment other than one year after the last refunds were issued.

26. It was not clearly and convincingly established that Department staff, during a meeting conducted on December 20, 2004, made any demand upon Respondent.

27. Respondent has not complied at any time with any of those demands.

28. Pursuant to the Settlement Agreement, Respondent was required to escheat any undeliverable refund to the state within three years from the date upon which it was determined that the particular refund was undeliverable. It was not clearly and convincingly established exactly when Respondent determined any particular refund was undeliverable.[4] Thus, it was not clearly and convincingly established when Respondent was first required to begin escheating undeliverable refunds pursuant to the Settlement Agreement. That means that it was not clearly and convincingly established that Respondent should have escheated any amount by the time it had received Mr. Wu's November 2003 letter. The remaining written requests for escheatment, including those of Mr. Weinger and Mr. Agbonkpolor, are construed as reiterating Mr. Wu's initial statement that escheatment pursuant to the Settlement Agreement was due one year after the last refunds were issued. Based on the above, Respondent was not required to escheat any refunds within the time frame described by Mr. Wu.

29. Based on the above, it was clearly and convincingly established that Respondent breached the escheatment provision of the Settlement Agreement by failing to escheat any undeliverable refunds. For example, the Department's audit of Respondent's books and records in 2002 revealed that, by then, many refunds had already been returned to Respondent as undeliverable. Even assuming the unlikely scenario that the undeliverable refunds all occurred at the end of the two-year refund period (i.e. April 2001), Respondent should have begun escheating at least some, if not many, of the refunds that were undeliverable three years from the end of the two-year refund period, i.e. by April of 2004. Under any scenario, Respondent should have escheated all of the undeliverable refunds by the time of the hearing of this matter. Respondent has escheated no amount at any time.

Mitigation & Aggravation

30. Respondent established some facts mitigating its failure to timely comply with the Settlement Agreement regarding escheating undeliverable refunds. Mr. Wu's November 2003 letter reasonably triggered confusion and concern on the part of Respondent, in that the Commissioner was requesting Respondent to make escheatment payments other than as agreed upon in the Settlement Agreement. The Commissioner thereafter failed to advise Respondent

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[4] See Legal Conclusion 1 below, regarding the burden and standard of proof for the allegations contained in the Accusation.

that Mr. Wu's statement was erroneous or otherwise try to diffuse the dispute triggered by Mr. Wu's November 2003 letter. Thus, some further delay by Respondent in beginning the escheatment process would have been warranted.

31. In aggravation, Mr. Wu's November 3, 2003 letter and the dispute that followed were not reasonable bases for Respondent to refuse to escheat any portion of the undeliverable refunds at any time, for the following reasons:

A. The Settlement Agreement was clear as to when Respondent was required to escheat.

B. Respondent's argument was not persuasive that it had been induced by fraud to execute the Settlement Agreement.[5]

C. Respondent's argument was not persuasive that there was a mistake of law in the Settlement Agreement that excused compliance with the escheatment provision.[6]

D. Mr. Gladstone's testimony that Respondent did not escheat at any time, for fear of being liable to the State Controller's Office for late fees and interest if the one year escheatment period applied, was also unpersuasive. As found above, the one year period did not apply to the Settlement Agreement. In any event, it was not established that Respondent would have been subject to any such late fees or interest had it escheated any amounts at any time.

32. Respondent did not establish any mitigation regarding its failure to comply with the Commissioner's demand for a special report of the refund and escheatment documentation (through Senior Examiner Agbonkpolor's letter dated March 29, 2004). Respondent did not establish that the requested documentation was unavailable due to circumstances beyond its control. Mr. Gladstone testified that the records were no longer available, but that he did not know why that was so. His testimony that the disappearance of the records coincided with the termination of the company's General Manager/Controller, whom he characterized as a disgruntled employee, was unpersuasive and speculative. Mr. Gladstone also unpersuasively testified that the records might have been destroyed as part of the company's regular purging process. Even if the subject records were purged, such would have been due to the neglect of Mr. Gladstone and Respondent. The documentation requested by the Commissioner was material to the Settlement Agreement, which, by Mr. Gladstone's testimony, had not been fully executed at the time the request was first made. It would have been unreasonable to not safeguard such important documentation, especially in light of Mr. Gladstone's testimony that he was constantly afraid of Respondent losing its licenses as a result of administrative action taken by the Commissioner relative to this dispute.

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[5] See Legal Conclusion 3 below.

[6] See Factual Finding 10 above, and Legal Conclusion 4 below.

33. Respondent established some general mitigating facts. Respondent has no other disciplinary record with the Commissioner. No evidence suggests that Respondent failed to comply with the many other provisions of the Settlement Agreement. The Commissioner did not prove that Respondent failed to make all the required refunds, and by Respondent's estimate it had paid $100,000.00 in refunds to many borrowers. The fact that Mr. Wu's November 2003 letter triggered the escheatment dispute, however, is off-set by the fact that Respondent had erroneously determined to start escheating later than the Settlement Agreement actually provided. The fact that Respondent did not hide from the Commissioner that it had not escheated any amounts is off-set by the fact that Respondent thereafter unreasonably refused to escheat any amount at any time.

LEGAL CONCLUSIONS

Burdens & Standards of Proof

1. The parties agree that Complainant has the burden of proof with regard to the matters alleged in the Accusation, and that the standard of proof for such is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 855-856.) Clear and convincing evidence requires a finding of high probability or evidence so clear as to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind. (*In re Michael G.* (1998) 63 Cal.App.4th 700, 709, fn. 6.)

2. In a disciplinary action such as this, however, the burden of proof of establishing an affirmative defense is on the respondent (*Whetstone v. Board of Dental Examiners* (1927) 87 Cal.App. 156, 164), which is consistent with the general rule placing the burden of proof on one who asserts a claim or defense (Evid. Code, § 500). The standard of proof for establishing an affirmative defense is proof by a preponderance of the evidence, because no other law or statute (including the Financial Code) requires otherwise. (Evid. Code, § 115.)

Respondent's Affirmative Defenses

3A. Fraud. Respondent contends the Commissioner knew Respondent's loan practices were lawful, yet pressured Respondent to enter into the contract by representing during negotiations leading to the Settlement Agreement that Respondent's loan practices were unlawful. Respondent also contends that the Commissioner's failure to disclose that SB 579 was pending during settlement negotiations was similarly fraudulent. Respondent argues that the Commissioner thereby procured the Settlement Agreement by fraud, and, for that reason, the Settlement Agreement is not enforceable and any failure to abide by its terms cannot be the basis of any discipline in this matter.

3B. The necessary elements of the affirmative defense of fraud in the procurement of a contract are as follows: one party to the contract made a false representation to the other; the party that made the false representation knew the representation was not true; the false representation was made to persuade the other party to agree to the contract; the other party reasonably relied on the false representation; and the other party would not have entered into the contract had it known that the representation was not true. (Judicial Council of California, Civil Jury Instructions (Jan. 2006), Instruction No. 335, p. 143; 1 Witkin, Summary of Cal. Law (10th edition 2005) Contracts, § 9.) In addition, "[w]here a failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent." (*Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 609.)

3C. Respondent did not establish by a preponderance of the evidence that the Commissioner procured the Settlement Agreement by fraud. (Factual Findings 4-15.)

Respondent failed to prove all the required elements of the affirmative defense of fraud in procuring a contract. For example, it was not established that any statement made by Department staff to Respondent or its counsel was false. To the contrary, it was established that Department staff believed at the relevant times that probable cause existed for administrative action against Respondent based on its loan practices. Neither was it established that Respondent reasonably relied on any representations made by Department staff regarding the legality of Respondent's loan practices. Respondent was represented at all times of the negotiations by counsel who knew the existing legal landscape and who did not hesitate to argue the legality of Respondent's loan practices to Department staff. In any event, Respondent was interested in settling the entire pending dispute, which involved many issues other than those addressed by SB 579. Moreover, in this context of a pending legal dispute, between two represented parties, where both parties knew, or should have known, that the outcome of any administrative or legal action was uncertain, it would not have been reasonable for Respondent to believe its loan practices were unlawful simply because the Commissioner's staff contended that was the case. Respondent also failed to establish that it would not have entered into the Settlement Agreement had it known that SB 579 was pending.

Although Department staff did not disclose to Respondent during the settlement negotiations that SB 579 was pending, Respondent cited no legal authority holding that one party to a pending legal dispute is required to inform the other of such information. In any event, because it was not established that Department staff believed Respondent's loan practices were legal, it cannot be concluded that Department staff's failure to disclose that SB 579 was pending was calculated to induce a false belief by Respondent.

4A. Mistake of Law. Respondent also contends that the parties made a mutual mistake of law in executing the Settlement Agreement regarding the time permitted for escheating the undeliverable refunds to the state. Although both parties believed Respondent had three years to escheat undeliverable refunds, Respondent contends the relevant law allowed only one year instead. Respondent argues that such a mutual mistake of law is a basis for relieving it of its obligation to carry out the escheatment provision of the Settlement Agreement.

4B. A mistake of law is defined as a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or, a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify. (Civ. Code, § 1578.) One remedy for mistake of law is rescission. (Civ. Code, §§ 1578, 1689.)

4C. Respondent did not establish by a preponderance of the evidence that the parties to the Settlement Agreement were mutually mistaken regarding the time permitted for Respondent to escheat the undeliverable refunds. The Settlement Agreement correctly recited that the Unclaimed Property Act contained in the Code of Civil Procedure applied, and that the applicable time period to escheat from the Act was three years. Code of Civil Procedure section 1520, subdivision (a), which is contained within the Unclaimed Property Act, provides for escheatment of tangible personal property located in this state "held in the ordinary course of the holder's business and [which] has remained unclaimed by the owner for more than three years after it became payable." The Settlement Agreement then set forth the parties understanding of how the escheatment period would operate.

The one year period to escheat contained in Code of Civil Procedure section 1519.5 is not applicable, because that time period only relates to "money ordered by a court or public agency to be refunded . . . ." The Settlement Agreement cannot be construed as an order of a public agency; it was a mutually agreed-upon contract. Respondent offered no legal authority suggesting the undeliverable refunds in this case fall under the one year escheat provision of section 1519.5.

Mr. Wu's statement in his November 3, 2003 letter that the one year escheatment period applied does not demonstrate that the parties made a mutual mistake of law when executing the Settlement Agreement. Mr. Wu had not reviewed the Settlement Agreement before sending his letter. There is no evidence that Mr. Wu independently researched the Unclaimed Property Act and came to a reasoned decision regarding the applicable time period contrary to the Settlement Agreement. It simply appears that Mr. Wu made an error in his demand letter regarding the operation of the Unclaimed Property Act. (Factual Findings 4-10, 16-23.)

Cause for Discipline

5A. Cause exists to discipline the four finance lender licenses of Respondent pursuant to Financial Code section 22714, subdivision (a)(1), because Respondent failed to comply with a demand of the Commissioner made pursuant to and within the authority of the CFLL. Specifically, Respondent failed to comply with the Commissioner's demand that it provide a special report of documentation regarding delivered refunds and escheatment of undeliverable refunds. (Factual Findings 1-28.)

5B. Financial Code section 22714, subdivision (a)(1), provides the Commissioner with authority to discipline a finance lender license when a "licensee has failed to comply with any demand, ruling, or requirement of the commissioner made pursuant to and within the authority of this division." The division referred to in section 22714 is division 9 of the Financial Code, which is the CFLL.

The word "demand" is not specifically defined in the CFLL. However, the common meaning of a word can be used for purposes of construing it as used in a statute. (*Smith v. Municipal Court of Glendale* (1959) 167 Cal.App.2d 534, 538.) The court in *Smith* found that the word "demand" was defined in its ordinary use as "[a]n asking with authority, claiming or challenging as due." (*Id.*)

By its own wording, the type of demand that is subject to Financial Code section 22714 is one "made pursuant to and within the Commissioner's authority . . ." under the CFLL. Financial Code section 22150 provides the Commissioner with authority to make "general rules and regulations and specific rulings, *demands*, and findings for the enforcement of this division, in addition to, and within the general purposes of, this division [the CFLL]." (Italics added.) Financial Code section 22001 establishes various purposes of the CFLL, one of which is protecting borrowers against unfair lending practices (subd. (a)(4)). According to Financial Code section 22001, the CFLL is to be liberally construed and applied to promote its underlying purposes and policies.

5C. In this case, the Commissioner's demand that Respondent escheat the undeliverable refunds pursuant to the Settlement Agreement constitutes a demand for purposes of Financial Code section 22714, subdivision (a)(1). The Settlement Agreement was a binding contract between the parties. Respondent had agreed to timely escheat undeliverable refunds pursuant to the Settlement Agreement. In consideration of two licenses granted to Respondent, and the Commissioner's agreement to forego any subsequent civil or administrative action against Respondent regarding the disputes resolved by the Settlement Agreement, the Commissioner was legally entitled to expect Respondent's timely compliance with that contract. The Commissioner's demand for timely escheatment of the undeliverable refunds was therefore a request made with authority, claim or challenge as due, for purposes of how the word "demand" was defined in the *Smith* case.

The Commissioner's demand that Respondent escheat the undeliverable refunds pursuant to the Settlement Agreement was also made within his authority under the CFLL. The Settlement Agreement involved various aspects of Respondent's consumer lending practices that were within the purview of the CFLL. The Settlement Agreement extracted promises and assurances of Respondent regarding future compliance with the CFLL, which was a means of enforcing the CFLL. The CFLL is meant to be liberally construed to promote its purposes and policies. Construing the Commissioner's demand that Respondent comply with the escheatment provision of the Settlement Agreement to be a "demand" for purposes of section 22714, subdivision (a), comports with such a liberal construction. To not construe the Commissioner's request for escheatment as a "demand" within the meaning of section 22714, subdivision (a), would frustrate the Commissioner's ability to enforce settlement agreements made with licensees involving lending practices under the CFLL, which would undercut the Commissioner's ability to enforce the CFLL and promote its underlying purposes.

In this case, however, it was not clearly and convincingly established that the Commissioner demanded Respondent to escheat the undeliverable refunds in conformity with the Settlement Agreement. Instead, Mr. Wu, an employee of the Commissioner, erroneously demanded that Respondent escheat undeliverable refunds one year after the last refunds were issued, which was not the agreed upon time in which Respondent was required to begin escheating pursuant to the Settlement Agreement. The various subsequently written requests from Department staff demanding escheatment never corrected Mr. Wu's initial error, so they are all deemed to have simply reiterated Mr. Wu's initial erroneous demand to escheat. Although the Commissioner had authority to demand compliance with the Settlement Agreement in furtherance of the CFLL, he did not have authority to demand an act to which the parties did not agree pursuant to the Settlement Agreement. Thus, it cannot be concluded that Respondent is subject to license discipline, for purposes of Financial Code section 22714, subdivision (a)(1), for failing to comply with the Commissioner's demand that it escheat the undeliverable refunds contrary to the Settlement Agreement.

5D. The Commissioner's request that Respondent provide documentation regarding delivered refunds and escheatment of undeliverable refunds constituted a request for a special report, within the meaning of Financial Code section 22159, subdivision (b), which authorizes the Commissioner to require licensees to "make special reports . . . ." Based on the authority of section 22159, subdivision (b), a request for a special report is thus a "demand" for purposes of section 22150, as well as a "demand" within the meaning of section 22714, subdivision (a)(1), in that the Commissioner is authorized to make such a demand pursuant to the CFLL, and the substance of the Commissioner's demand here related to promoting and enforcing the CFLL. In this case, the Commissioner initially demanded, through the Agbonkpolor letter dated March 29, 2004, that Respondent provide a special report regarding documentation of delivered refunds and escheatment of undeliverable refunds subject to the Settlement Agreement. That initial request was reiterated in several more follow-up letters from Mr. Agbonkpolor. Respondent did not comply with the demand for a special report at any time. Thus, cause for disciplining Respondent's licenses was established on this ground.

6. Cause exists to discipline the four finance lender licenses of Respondent pursuant to Financial Code section 22714, subdivision (a)(2), because Respondent violated a provision of the CFLL. Specifically, Respondent violated section 22159, subdivision (b), which is a provision of the CFLL, when it failed to comply with the Commissioner's request for a special report, as discussed above in Legal Conclusion 5D. (Factual Findings 1-28.)

7. Cause exists to discipline Respondent's finance lender license numbers 603-5654 and 605-1810, pursuant to Financial Code section 22714, subdivision (a)(3), because a fact or condition now exists, that, if it had existed at the time of original licensure, reasonably would have warranted the Commissioner's refusal to issue those two licenses to Respondent. Specifically, Respondent failed to comply with the Settlement Agreement regarding escheating undeliverable refunds, in that it breached that provision of the contract by failing to escheat any amount at any time. Respondent was issued these two licenses, in part, as consideration for entering into the Settlement Agreement. Had the Commissioner known at the time that Respondent would breach a material part of the Settlement Agreement (escheating the undeliverable refunds), the Commissioner would have had reasonable grounds to not issue the two licenses. (Factual Findings 1-29.)

Disposition

8A. Financial Code section 22714, subdivision (a)(1), provides the Commissioner with authority to suspend or revoke a lender license. Financial Code section 22710 limits the period of suspension to no more than 30 days. The Commissioner has promulgated no regulations or guidelines that otherwise outline the parameters of discipline in such matters.

8B. A seven day suspension of Respondent's licenses is warranted. Cause for discipline was established due to Respondent's failure to comply with the Commissioner's demand for a special report regarding documentation of refunds and escheatment (all four licenses) and its breach of the Settlement Agreement by failing to escheat any amount at any time (license numbers 603-5654 and 605-1810). Respondent established no reasonable excuse for failing to provide the special report to the Commissioner upon demand. Some mitigation was established for an initial delay in beginning escheatment due to the initial confusion caused by Mr. Wu's November 2003 letter and the Commissioner's failure to thereafter try to diffuse the dispute by correcting Mr. Wu's error. In aggravation, Respondent unreasonably failed to escheat any amount at any subsequent time, although the Settlement Agreement clearly required it to have begun and completed escheatment by the time of the hearing at the very least.

The Commissioner is responsible for enforcing the CFLL. Respondent's failure to comply with the Commissioner's special report demand and its breach of an agreement made with the Commissioner undercuts the Commissioner's ability to enforce the CFLL are thus serious matters. As demonstrated by the unsuccessful arguments Respondent made at the hearing that tended to place all blame on the Commissioner for this dispute, Respondent does not appear to accept any responsibility. Thus, a suspension is necessary for Respondent and its personnel to understand its errors and to reinforce in it the absolute

requirement to comply with authorized demands of the Commissioner and its legal contracts and agreements. Since Respondent expressly agreed in the Settlement Agreement to escheat undeliverable refunds and it has failed to do so, an order requiring Respondent to do so and thereafter provide proof to the Commissioner that such has been done is also warranted. (Factual Findings 1-33.)

8C. Revocation is not warranted in this case. The misconduct can be described as moderate. Although approximately $200,000.00 of undeliverable refunds have not yet been escheated to the state, no direct injury to a consumer was established. Respondent's misconduct revolves primarily around a legal dispute it has with the Commissioner rather than intentional acts of dishonesty or fraud. The cause for discipline stems from a dispute over interpreting a contract clause, and subsequent reporting relating to it, and no other independent violation of the CFLL. Respondent otherwise lived up to its other obligations of the Settlement Agreement. Respondent has no prior record of disciplinary history with the Commissioner. Under these circumstances, revocation would be overly harsh and punitive. (Factual Findings 1-33.)

ORDERS

All of the California Finance Lender's Licenses issued to Respondent Growth Resource Group, Inc. are suspended for seven days.

Respondent Growth Resource Group, Inc. shall, within 180 days, escheat to the State Controller's Office all refunds returned as undeliverable pursuant to the Settlement Agreement executed with the Commissioner, and provide sufficient documentary proof to the Commissioner that such has been done.

DATED: July 14, 2006

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings